Pembangunan Cahaya Tulin Sdn Bhd & Ors v Citibank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03–30 OF 2007
ZALEHA ZAHARI, SURIYADI AND SULONG MATJERAIE JJCA
26 FEBRUARY 2008

Civil Procedure — Amendment — Order — Whether procedure for settling terms of order had been complied with — Whether differently constituted panel of Court of Appeal can amend order — Rules of the High Court 1980 O 42 r 8

The respondent sought leave to amend an order of the Court of Appeal dated 2 July 2007, made by a differently constituted panel. The amendment which the respondent wanted to make was to insert the ground upon which the earlier Court of Appeal had allowed the appeal.

Held, dismissing the application with costs:

(1) (per **Zaleha Zahari JCA** delivering majority judgment) Based on the record in the court file, the prescribed procedure had been observed. The terms of the sealed order that had been issued reflected the pronouncement made by the panel of the Court of Appeal on the date in question (see para 5).

(2) (per **Zaleha Zahari JCA** delivering majority judgment) The attempt to seek an amendment by way of notice of motion to insert the words in the proposed amendment was misconceived. A differently constituted panel of Court of Appeal judges would not be in a position to know the actual pronouncement of the earlier panel as to the reason why an appeal had been allowed, unless it had been expressly recorded. In the absence of an express recording to that effect, it was not open for this panel to grant an order in terms of the application (see para 6).

(3) (per **Suriyadi JCA** dissenting) In the circumstances of the case O 42 r 8 of the Rules of the High Court 1980 had not been complied with. Based on the reasoning in *Parasuraman a/l Kuppan v Sazali bin Md Akhir & Anor* [1999] 4 MLJ 113, the 'perfected order' ought to be set aside and the matter resolved by the registrar. By such an order, not only will the relevant statutory requirements be complied with, but it will put to rest any real fear of embellishment or interference by a

subsequent panel. In the presence of the registrar, parties could discuss the matter at hand comprehensively, to the satisfaction of all parties (see para 15).

[Bahasa Malaysia summary

Responden memohon kebenaran untuk meminda perintah Mahkamah Rayuan yang bertarikh 2 Julai 2007, yang dibuat oleh panel yang berbeza. Pindaan yang ingin dibuat oleh responden adalah untuk memasukkan alasan atas mana Mahkamah Rayuan terdahulu membenarkan rayuan.

Diputuskan, menolak permohonan dengan kos:

(1) (oleh **Zaleha Zahari HMR** menyampaikan penghakiman majoriti) Berdasarkan kepada rekod di dalam fail mahkamah, prosedur yang ditetapkan telah pun dipatuhi. Terma-terma perintah yang dimeterai yang telah dikeluarkan menunjukkan pengumuman yang dibuat oleh panel Mahkamah Rayuan tersebut pada hari dalam persoalan (lihat perenggan 5).

(2) (oleh **Zaleha Zahari HMR** menyampaikan penghakiman majoriti) Percubaan untuk membuat pindaan melalui notis usul untuk memasukkan perkataan-perkataan di dalam cadangan pindaan telah disalah tanggap. Panel lain hakim-hakim Mahkamah Rayuan tidak akan berada dalam kedudukan untuk mengetahui pengumuman sebenar panel terdahulu mengenai alasan mengapa rayuan telah dibenarkan, kecuali ia telah direkodkan dengan jelas. Tanpa rekod yang jelas mengenainya, ia tidak terbuka untuk panel ini untuk memberikan perintah seperti yang dipohon di dalam permohonan tersebut (lihat perenggan 6).

(3) (oleh **Suriyadi HMR** menentang) Dalam keadaan kes ini, A 42 k 8 Kaedah-Kaedah Mahkamah Tinggi 1980 tidak dipatuhi. Berdasarkan kepada alasan di dalam kes *Parasuraman a/l Kuppan v Sazali bin Md Akhir & Anor* [1999] 4 MLJ 113, 'perfected order' mesti diketepikan dan perkara tersebut diselesaikan oleh pendaftar. Melalui perintah sedemikian, bukan sahaja keperluan statutori yang relevan akan dipatuhi, tetapi ia akan menghilangkan sebarang kebimbangan terhadap penambahan atau campur tangan oleh panel yang kemudian. Dalam kehadiran pendaftar, pihak-pihak boleh membincangkan perkara tersebut dengan menyeluruh, secara yang memuaskan semua pihak (lihat perenggan 15).]

Notes

For cases on amendment order, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 556–560.

Cases referred to

Parasuraman a/l Kuppan v Sazali bin Md Akhir & Anor [1999] 4 MLJ 113 (folld)

Legislation referred to

Rules of the High Court 1980 O 42 r 8

Appeal from: Suit No D6–22–1016 of 2005 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (Arthur Wang Ming Way and Aishah Fadin Baharudin with him) (Arthur Wang, Lian & Associates) for the appellant.
CW Teo (YM Cheong with him) (Khaw & Partners) for the respondent.

Zaleha Zahari JCA (delivering majority judgment):

[1] The respondent's application vide notice of motion filed on 7 November 2007 ('encl 20a') was dismissed with costs on 29 January 2008 by majority. I was of the view that encl 20a should be dismissed for the following reasons:

[2] By encl 20a the respondent sought the court's leave to amend an order made by a differently constituted panel of a Court of Appeal, ie that dated 2 July 2007, in terms as set out in annexure A of the application. The amendment which the respondent wanted to make was to insert the ground upon which that earlier Court of Appeal panel had allowed the appeal, ie by inserting the following:

> hanya atas alasan bahawa penghakiman ingkar kehadiran yang dimasukkan terhadap perayu/defendan pada 18 haribulan Ogos 2005 yang memihak responden adalah satu penghakiman yang tidak teratur.

[3] The question in issue here is whether this panel has the jurisdiction to settle an order allegedly to reflect the true order pronounced by a differently constituted panel?

[4] The procedure to be adopted by parties in settling an order according to the rules is this: Where a party in whose favour an order is given is represented by a solicitor, a copy of the draft shall be submitted for approval to the solicitor, if any, of the other party who shall within two days of the

receipt thereof, return such copy with his signed consent or any required amendments. Should the solicitors concerned be unable to agree upon the draft, any one of them may obtain an appointment before the registrar (in this case the registrar of the Court of Appeal), of which notice shall be given to the other, to settle the terms of the order. In respect of an order made by the Court of Appeal, any party may require the matter in dispute to be referred to the presiding judge of the Court of Appeal which heard the appeal to settle the terms of the order.

[5] My understanding from the feedback given by the registrar based on the record in the court file is that the prescribed procedure had in fact been observed. The terms of the sealed order that had been issued did in fact reflect the pronouncement made by the panel of the Court of Appeal on the date in question.

[6] Thus, notwithstanding the fact that there is a common member between that earlier panel and that of this panel (ie Datuk Suriyadi bin Halim Omar JCA), I am of the view that the respondent's counsel's attempt to seek an amendment by way of notice of motion to insert the words in the proposed amendment is misconceived. A differently constituted panel of Court of Appeal judges would not be in a position to know the actual pronouncement of the earlier panel as to the reason why an appeal had been allowed unless it had been expressly recorded. In the absence of an express recording to that effect, it was not open for this panel to grant an order in terms of the application.

[7] I accordingly directed that the application in encl 20a be dismissed with costs.

[8] My brother Justice Sulong Matjeraie has read this judgment in draft and has concurred with the contents therein.

Suriyadi JCA (delivering dissenting judgment):

[9] On 29 January 2008, the panel had heard encl 20a, a motion filed by the respondent for an order that the order of the Court of Appeal dated 2 July 2007, be amended in the manner indicated in the proposed amended order. By majority decision that application was dismissed. I had dissented and had opined that the 'perfected order' be revisited by the senior assistant register, to streamline it in accordance with the requirements of procedural law, and in the course of it resolve any dissatisfactions.

[10] Before supplying the reasons for my dissenting view, it would not be inappropriate, if I were to reproduce the antecedents of the case that eventually led to my view. On 2 July 2007 a differently constituted panel had initially heard the matter and had thereafter meted down certain orders. By coincidence I was also one of the panelists that issued the impugned order. It must also be emphasised that the issue of recusal on my part did not arise, as parties had raised no objection to my presence, nor did I find any valid reason for my unnecessary withdrawal. In a gist, this panel had allowed the appeal and thereupon set aside the default judgment under appeal, only on the ground that the default judgment was an irregular judgment.

[11] On the same day, and that was 2 July 2007, the process of preparing the draft was initiated, with the respondent's solicitor preparing and serving the draft order on the appellant's solicitors. Counter proposals took place between them, before the latter forwarded the draft order to the deputy registrar of the Court of Appeal. Despite the existence of strong objections and views held by parties, the registry of the Court of Appeal, faultlessly had returned to the appellant's solicitor one sealed order dated 2 July 2007 and one certified copy of the said order. I say faultlessly, as the registry had remained ignorant of the objections; for want of disclosure by parties in the light of no appointments being held with the registrar to settle the terms. It was admitted by both parties that they never met the registrar to resolve the matter.

[12] Naturally when the respondent's solicitors received the perfected order it promptly objected to the order hence this application to amend it.

[13] I had held the view that in the circumstances of the case O 42 r 8 of the Rules of the High Court 1980 had not been complied with. It reads:

> 8 Preparation of judgment or order (O 42 r 8)(1)
>
> (1) Where the party in whose favour a judgment or order is given or made is represented by a solicitor, a copy of the draft shall be submitted for approval to the solicitor (if any) of the other party who shall within 2 days of the receipt thereof, or within such further time as may in any case be allowed by the Registrar, return such copy with his signed consent or any required amendments thereto.
>
> (2) When the solicitor omits to return the copy of the draft within the time prescribed, he shall be deemed to have consented to the terms thereof.

(3) In any case where the solicitors concerned are unable to agree upon the draft, any one of them may obtain an appointment before the Registrar, of which notice shall be given to the other, to settle the terms of the judgment or order.

(4) Every judgment or order shall be settled by the Registrar, but in the case of a judgment or order made by a Judge, any party may require the matter in dispute to be referred to the Judge for his determination.

(5) Where the other party has no solicitor, the draft shall be submitted to the Registrar.

[14] In relation to the above provision, Haidar JCA in *Parasuraman a/l Kuppan v Sazali bin Md Akhir & Anor* [1999] 4 MLJ 113 in clear terms had said:

> Counsel for both parties should have sought an appointment with the judge (in this case the presiding judge) for the dispute in respect of the draft order to be determined. Counsel for the respondent should have taken the initiative as it was he who first prepared the draft order knowing fully well of the disagreement as to the terms of his draft order when En Francis Nathar sent his own draft order to him. *It was not for the registrar to resolve the dispute in their absence* (see O 42 r 8(3) and (4) of the RHC) (see p 120F–G).
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> (Emphasis added.)

[15] It was based on the above reasoning that I had decided that the 'perfected order' be set aside and the matter resolved by the registrar. By such an order, not only will the relevant statutory requirements be complied with, but it will put to rest any real fear of embellishment or interference by a subsequent panel. In the presence of the registrar, parties could discuss the matter at hand comprehensively, to the satisfaction of all parties.

Application dismissed with costs.

Reported by Brendan Navin Siva